

THE HONORABLE FRANKLIN D. BURGESS
MAGISTRATE JUDGE KAREN STROMBOM

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

ROBERT SMITH, JR.,

Plaintiff,

v.

THE STATE OF WASHINGTON, *et al.*,

Defendants.

NO. C07-5135 FDB/KLS

MOTION TO REVOKE
PLAINTIFF'S *IN FORMA*
PAUPERIS STATUS PURSUANT
TO 28 U.S.C. § 1915(g) AND
MEMORANDUM IN SUPPORT
THEREOF

NOTE ON MOTION CALENDAR:
AUGUST 24, 2007

MOTION

Defendants through their attorneys, ROBERT M. MCKENNA, Attorney General, and HEIDI S. HOLLAND, Assistant Attorney General, move to revoke Plaintiff's *in forma pauperis* status pursuant to 28 U.S.C. § 1915(g) and submit the following supporting memorandum.

MEMORANDUM

I. INTRODUCTION

On March 15, 2007, Plaintiff, a Washington State Department of Corrections inmate, filed a motion to proceed *in forma pauperis*. Dkt. No. 1, Motion for Leave to Proceed *in forma pauperis*. On April 19, 2007, the Court granted his motion. Dkt. No. 4, Order granting Motion for Leave to Proceed *in forma pauperis*. Plaintiff, in his Civil Rights Complaint, claimed to

1 have only brought one previous lawsuit in federal court while a prisoner. Dkt. No. 5, Prisoner
 2 Civil Rights Complaint, at 1. That assertion is patently untrue.¹ In fact, Plaintiff has brought
 3 at least thirty-one federal civil actions regarding his incarceration since 1990. Exhibit 1,
 4 Declaration of Heather Hocking, Attachment A, Printout from Courtlink of Search Results for
 5 Federal Court Cases Involving Robert Smith Jr.; Exhibit 1, Attachment J, Order to Show
 6 Cause, Smith v. Bettis, et al., USDC Cause No. C04-2226JLR-MJB, at Exhibit A.

7 **II. ARGUMENT**

8 Plaintiff's *in forma pauperis* status should be revoked because he has received more
 9 than three formal "strikes" pursuant to 28 U.S.C. § 1915(g)

10 **A. The purpose of the Prison Litigation Reform Act (PLRA) is to reduce useless, 11 frivolous litigation that puts an undue burden on the court system.**

12 The Prison Litigation Reform Act (PLRA), specifically 28 U.S.C. § 1915(g) states:

13 In no event shall a prisoner bring a civil action or appeal a judgment in a civil
 14 action or proceeding under this section if the prisoner has, on 3 or more
 15 occasions, while incarcerated or detained in any facility, brought an action or
 16 appeal in a court of the United States that was dismissed on the grounds that it
 17 was frivolous, malicious, or fails to state a claim upon which relief may be
 18 granted, unless the prisoner is under imminent danger of serious physical injury.

19 The court in Tierney v. Kupers, 128 F.3d 1310 (9th Cir. 1997) instructed,

20 In support of the PLRA, proponents cited the costliness and common frivolity
 21 of prison inmate lawsuits. *See, e.g.*, 141 Cong. Rec. S19, 110-07, S19,113 (daily
 22 ed. Dec. 21, 1995) (statement of Senator Kyl). They spoke of the Act's potential
 23 to act as a deterrent and achieve a 50% reduction in "bogus" federal inmate
 24 claims. *Id.* at S19,114.
 25 Id. at 1311.

26 That notwithstanding, the fact that the Plaintiff has filed thirty-one federal civil actions alone
 does not suffice to show that Plaintiff has suffered "three strikes" under the PLRA. Andrews
v. King, 398 F.3d 1113 (9th Cir. 2005). Defendants bear the initial production burden to show
 that at least three of these cases have been dismissed as frivolous, malicious, or for failure to

¹ This is not the first time Plaintiff has misinformed the Court. In Smith v. Bettis, USDC Cause No. C04-2226-JLR, Plaintiff claimed in his civil rights complaint that he had filed three previous lawsuits. However, the Court noted that its records revealed that Plaintiff had filed at least twenty six lawsuits since 1990, including

1 state claim. Id. Once the defendants have met this initial burden, the burden then shifts to the
 2 inmate, who must rebut the defendants' showing by explaining why a prior dismissal should
 3 not count as a strike. Id. Plaintiff's litigation history clearly indicates his abuse of the process,
 4 which is exactly what the PLRA was intended to prevent. In four of these federal civil actions,
 5 Plaintiff has received a formal "strike," where the Court has clearly made a finding that the
 6 dismissal counts as a strike under 28 U.S.C. § 1915(g).

7 **B. Plaintiff's *in forma pauperis* status should be revoked in that he has on more than**
 8 **three occasions brought an action or appeal that was determined to be frivolous,**
 9 **malicious or failed to state a claim.**

10 Plaintiff has explicitly received four formal "strikes" pursuant to 28 U.S.C. § 1915(g).
 11 Exhibit 1, Attachment B, Order Dismissing Complaint Without Prejudice, Smith v. Gambone,
 12 et al., USDC Cause No. CS-98-473-RHW; Exhibit 1, Attachment E, Order, Smith v. DSHS,
 13 USDC Cause No. C98-1121-R; Exhibit 1, Attachment H, Order, Smith v. Bettis, et al., USDC
 14 Cause No. C04-1396C; Exhibit 1, Attachment L, Order Dismissing § 1983 Action, Smith v.
 15 Bettis, et al., USDC Cause No. C04-2226-JLR-MJB.² Additionally, Plaintiff has **implicitly**
 16 received five additional "strikes" pursuant to 28 U.S.C. § 1915(g).³ Accordingly, Plaintiff's
 17 motion to proceed *in forma pauperis* should be revoked absent a showing that he is "under
 18 imminent danger of serious physical injury" pursuant to 28 U.S.C. § 1915(g).

19 In Smith v. Gambone, USDC Cause No. CS-98-473-R, the Court entered an order on
 20 August 6, 1999 advising the Plaintiff of the deficiencies of his complaints and directing him to
 21 amend or voluntarily dismiss within sixty days. Exhibit 1, Attachment B. Plaintiff did not do
 22 either. The Court dismissed his complaint on December 10, 1999 for failing to state a claim

23 ²Of note, since filing this civil lawsuit, Plaintiff has incurred a fifth "formal" strike in Smith v. Roberts.
 24 Exhibit 1, Attachment O, Order Adopting Report and Recommendation, Smith v. Roberts, et al., USDC Cause
 25 No. C06-5635-RJB; Exhibit 1, Attachment P, Judgment in a Civil Case, Smith v. Roberts, et al., USDC Cause No.
 26 06-5635-RJB. While instructive, this recent "strike" does not count against Plaintiff because only those received
 up to the time this lawsuit was filed are considered. Lopez v. U.S. Dept. of Justice, 2007 WL 1211652 (3rd Cir.).

³ See Smith v. Sgt. Herriot and C/O J. Daggett, USDC Cause No. CT-98-5027-EFS; Smith v. Kittleson,
et al., USDC Cause No. C00-2070R; Smith v. Taylor, USDC Cause No. C04-0345TSZ; Smith v. Robin, USDC
 Cause No. C05-0280-JLR-JPD; Smith v. Davis, et al., USDC Cause No. C04-1483JLR.

1 upon which relief may be granted. Id. The Court wrote “**This dismissal of Plaintiff’s**
 2 **complaint may count as one of the three dismissals allowed by 28 U.S.C. §1915(g) and**
 3 **may adversely affect his ability to file future claims.**” Id. (emphasis in original court order).

4 In Smith v. DSHS, USDC Cause No. 98-1121-R, Plaintiff challenged his state criminal
 5 conviction and sentence. Exhibit 1, Attachment D, Report and Recommendation, Smith v.
 6 DSHS., USDC Cause No. 98-1121-R, at 2. The Magistrate Judge found that Plaintiff failed to
 7 state a claim upon which relief could be granted. Exhibit 1, Attachment D, at 4. Additionally,
 8 he recommended that a strike be assessed against Plaintiff pursuant to 28 U.S.C. § 1915(g). Id.
 9 On March 30, 1999, the Court entered an order that adopted the Report and Recommendation
 10 and wrote, “**Plaintiff is assessed a “strike” pursuant to 28 U.S.C. § 1915(g).**” Exhibit 1,
 11 Attachment E (emphasis added).

12 In Smith v. Bettis, USDC Cause No. C04-1396C, the Court found that Plaintiff’s
 13 claims did not rise to the level of a constitutional violation. Exhibit 1, Attachment H. On
 14 October 22, 2004, the Court entered an order that adopted the Report and Recommendation
 15 and wrote “**This dismissal shall count as a dismissal under 28 U.S.C. § 1915(g).**” Id.
 16 (emphasis added).

17 In Smith v. Bettis, USDC Cause No. C04-2226JLR, Plaintiff alleged that the
 18 defendants violated his civil rights when they searched his cell on October 10, 2004. However,
 19 after reviewing the record the Magistrate Judge concluded in her Report and Recommendation
 20 that “Plaintiff’s claims lack legal support and factual support.” Exhibit 1, Attachment K, at 4.
 21 She went onto state “The Court recommends that this dismissal count as a “strike” under 28
 22 U.S.C. § 1915 (g), because plaintiff’s claims are legally and factually frivolous.” Id. On
 23 February 27, 2006, the Court entered an order that adopted the Report and Recommendation
 24 and wrote “**This dismissal shall count as a dismissal under 28 U.S.C. § 1915(g).**” Exhibit 1,
 25 Attachment L (emphasis added).

Plaintiff's history with the federal courts clearly demonstrates his abuse of the civil litigation process. It is notable that this would not be the first time Plaintiff's *in forma pauperis* status has been revoked. In Smith v. Lehman, USDC Cause No. CV03-05691-FDB, the Court revoked his *in forma pauperis* status because the Court found that his appeal was not taken in good faith. Exhibit 1, Attachment Q, Order/Notice of Referral, Smith v. Lehman, et al., USDC Cause No. CV03-05691-FDB; Exhibit 1, Attachment R, Order, Smith v. Lehman, et al., 9th Circuit Cause No. 04-35368. Accordingly, Plaintiff's *in forma pauperis* status, in this case, should be revoked.

III. CONCLUSION

For the aforementioned reasons, Defendants respectfully move the court to revoke Plaintiff's *in forma pauperis* status pursuant to 28 U.S.C. § 1915(g) and require that he pay the filing fee or his claim be dismissed.

DATED this 27th day of July, 2007.

ROBERT M. MCKENNA
Attorney General

/s/Heidi S. Holland
HEIDI S. HOLLAND, WSBA #27264
Assistant Attorney General
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing MOTION TO REVOKE PLAINTIFF'S *IN FORMA PAUPERIS* STATUS PURSUANT TO 28 U.S.C. § 1915(g) with the Clerk of the Court using the CM/ECF system. I certify that I mailed by United States Postal Service the document to the following non CM/ECF participants:

ROBERT SMITH, JR #128227
U-G-C-24L
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520-9504

DATED this 27th day of July, 2007.

/s/ Kenna A. Davies
KENNA A. DAVIES
Legal Assistant II